Chapter 5
Legal and Regulatory Constraints to Water Management

The ability to manage water in the Clark Fork River Basin is determined, at least in part, by a number of existing legal and regulatory requirements, commitments, and proposals in addition to individual water rights. This chapter provides an overview of these constraints that affect the entire basin and its individual sub-basins. Chapter 6, which follows, discusses potential constraints arising from the hydropower water associated with dams in the lower basin. A bibliography for additional information is also included.

Clark Fork Basin

Constraints that affect the entire basin include:

- Off-Reservation Reserved and Aboriginal Water Right Claims by the Confederated Salish and Kootenai Tribes - In the Tribes' proposed compact to the Compact Commission, the Tribes claim, "off-reservation reserved and aboriginal consumptive and non-consumptive water rights that are derived from their time immemorial use and habitation of a vast aboriginal territory in Montana and elsewhere." This includes the waters of western Montana and, according to the Tribes, is based in part on the Hell Gate Treaty of 1855.
- Federal Reserved Water Rights - The U.S. Forest Service claims reserved water rights for channel maintenance flows for those watercourses on Forest Service lands in the state. The Reserved Water Rights Compact Commission is negotiating these claims
- Bull Trout - Bull trout are the only fish and wildlife species in the basin currently listed under the Endangered Species Act that have implications for basin water management. Bull trout are listed as threatened. This designation requires special consideration under federal actions that may impact the survival and viability of the species. Unless a water management activity has a federal nexus, i.e., it involves federal funding or requires a federal permit, the activity is less likely to be affected by the bull trout listing. If a federal nexus exists, then the federal funding or permitting agency is required to consult with the U.S. Fish and Wildlife Service regarding possible impacts to bull trout and implications for the recovery plan and/or critical habitat designation. For example, many river or stream related projects (such as those in or near a perennial stream or river which require a 310 permit from a conservation district) require a 404 permit from the U.S. Army Corps of Engineers. A 404 permit would trigger the consultation requirement.
- Water Quality and TMDLs - Pursuant to state law (75-5-703 MCA), Total Maximum Daily Load targets (TMDLs) have to be developed by the Montana Department of Environmental Quality (DEQ) with help from local watershed groups and approved by the U.S. Environmental Protection Agency for those streams and rivers that have been identified as impaired under the Clean Water Act. Stream dewatering does not constitute a direct impairment requiring development of a TMDL. Water quantity may be an indirect issue, however, because it affects dilution of pollutants that cause water quality standard violations, including temperatures that inhibit cold water fisheries. The Clark Fork River and most of its tributaries have some type of water quality impairment. TMDLs have already been calculated for the Clark Fork mainstem and Flathead Lake. DEQ is working with local watershed groups to define sources of pollution and calculate TMDL targets for the other impaired tributaries. Development and implementation of mitigating strategies to reach the targets will follow. The federal court has set a finite time frame for DEQ to develop and obtain EPA approval for TMDL implementation plans.
- Pacific Northwest Coordination Agreement - The Pacific Northwest Coordination Agreement is a contract for planned operation among the 16 major operating utilities with hydropower

facilities in the Columbia River drainage. The agreement provides operational guarantees that ensure the usability of storage under the Columbia River Treaty between the United States and Canada to downstream generating plants and specifies the restoration of pre-treaty capabilities to certain plants under certain conditions. In short, it tries to optimize the production power from the system as a whole. The operation of the basin dams with storage (Hungry Horse, Kerr, and Noxon Rapids dams), is affected by the agreement.

- Downstream Water Users - Water can be allocated between states via an interstate compact, equitable apportionment litigation between the states in the U.S. Supreme Court, or by Congressional apportionment. No compact providing for water allocation exists among the states of the Columbia River basin, no allocation has resulted from litigation, and there has been no Congressional apportionment. This means that Montana water users in the Clark Fork basin are not currently at risk to claims by downstream state water rights holders. One of the original justifications for initiating the statewide adjudication of pre-1973 water rights was to position Montana favorably in the event of future claims by downstream states. As basin water use grows, an apportionment of some sort between the states may occur.

Lower Clark Fork Sub-basin

The constraints that affect water management and use in the lower sub-basin (the area between the Montana-Idaho boundary and the confluence of the Flathead and Clark Fork rivers) include:

- Thompson Falls Dam – The Federal Energy Regulatory Commission (FERC) license requires 6,000 cfs continuous minimum outflow or the inflow, whichever is less.
- Noxon Rapids Dam - The FERC license establishes as general operating limits that the Noxon Rapids project maintain a maximum forebay elevation of 2,331.0 feet, a minimum forebay elevation of 2,327.0 feet from May 15 through September 30, a minimum forebay elevation of 2,321.0 feet from October 1 through May 14, and a maximum forebay draft rate of 2 feet per day (net) and 5 feet per week (net).
- Cabinet Gorge Dam - The FERC license establishes as general operating limits that the Cabinet Gorge project maintain a maximum forebay elevation of 2,175.0 feet, a minimum forebay elevation of 2,168.0 feet, and a total minimum total project discharge 5,000 cfs.

Middle Clark Fork Sub-basin

The constraints that affect water management and use in the middle sub-basin (the area between the confluence of the Flathead and Clark Fork rivers and Milltown Dam) include:

- Milltown Dam and Superfund Site - A number of heavy metal problems exist because of this dam, and the issue is how to deal with them. The dam and its reservoir are part of the Clark Fork Superfund site. EPA has decided that the dam and contaminated sediments in the reservoir will be removed by 2006 or 2007. Once the dam is removed, the water rights associated with the generation of hydropower at Milltown Dam will have to be changed to another use or they will be lost due to abandonment.

Upper Clark Fork River Sub-basin

The upper Clark Fork River sub-basin extends from Milltown Dam to the headwaters of the Clark Fork River, including the Blackfoot and Little Blackfoot Rivers and Rock Creek. Constraints that affect water management and use in this area include:

- Basin Closure - (MCA. 85-2- 336 & 337) This closure applies to new surface water permits but exempts water for stock use and applications for stored water, groundwater, and power generation at existing hydroelectric dams. Individuals desiring to appropriate groundwater must demonstrate that the appropriation would not be substantially or directly connected to the surface waters of the Clark Fork.
- Superfund Designation and Natural Resource Damage Suit - Four sites have been designated as superfund sites within the river corridor. These designations affect restoration and water conservation projects. No flow requirements exist associated with these sites.
- Murphy Water Rights - DFWP has claimed instream flow water rights on two streams in this sub-basin, Rock Creek and the Blackfoot River. The right on Rock Creek exists from its mouth to its headwaters. The priority date is 1971 and the flows range from 150 cfs to 926 cfs. On the Blackfoot River, the right extends from its mouth to the confluence with the North Fork of the Blackfoot River. The priority date is 1971 and the flows range from 360 cfs to 2,000 cfs. A drought management plan has been developed and implemented on a voluntarily basis to try to meet these flows during drought.

Flathead River Sub-basin

The Flathead sub-basin includes all of the Flathead River drainage. Constraints here include:

- Kerr Dam - The FERC license requires that spring refill of Flathead Lake begin when the U.S. Army Corps of Engineers decides that the threat of flooding has passed and should reach 2,890 feet by Memorial Day. The lake level must be maintained at or near full pool, 2,893 feet elevation, from June 15 through September. The lake can be drafted to its maximum 10 feet through the winter. Also, pursuant to the FERC license, minimum discharge from the dam cannot drop below 3,200 cfs from July 1 to April 15. Beginning on April 16, discharge can be increased and reach a rate 12,700 cfs by mid-May. The flow rate must be ramped back down to the base flow by July 30. In March 2002, pursuant to its FERC license, PPL Montana filed an interim drought management plan with the U.S. Department of Interior (DOI). DOI has not yet acted on the plan
- Endangered Species Releases from Hungry Horse Dam - Under the Endangered Species Act (ESA), Hungry Horse Dam is required to provide instream releases for local bull trout populations in the lower South Fork and Flathead rivers and releases in July and August for anadromous salmon species downstream of Grand Coulee Dam. These flows are bypassed through Flathead Lake and Kerr Dam. Operations must maintain a 400-900 cfs minimum flow below Hungry Horse Dam[1] and 3,500 cfs in the main stem of the river.[2] During a drought year, pursuant to the voluntary agreement with the state, the Bureau of Reclamation (USBR), which operates Hungry Horse Dam, can reduce the 3,500 cfs on the main stem to 3,200 cfs. Since the

[1] According to the *Columbia River Fish and Wildlife Program* adopted by the Northwest Power and Conservation Council, the minimum flow is determined based on the January final volume runoff forecast for Hungry Horse Reservoir for the period of April 1 to August 31. When the April-through-August forecast is greater than 1,790 thousand acre-feet (KAF), the minimum flow shall be 900 cfs. When the forecast is less than 1,190 KAF, the minimum flow may be reduced to 400 cfs. When the forecast is between 1,190 and 1,790 KAF, the minimum flow shall be linearly interpolated between 400 and 900 cfs.

[2] The program provides that Hungry Horse Dam discharge must maintain the established minimum flow of 3,500 cfs at Columbia Falls. However, in the event of a flood emergency (when river stage at Columbia Falls reaches 13 feet), the minimum flow in the South Fork can be reduced to the physical minimum (approximately 145 cfs).

1995 ESA biological opinion for Columbia River salmon, the top 25 feet of reservoir storage is available for salmon flows. All constraints are combined in integrated rule curves that are used to govern operation. Pursuant to the 2002 Biological Opinion issued by the National Marine Fisheries Service, USBR releases approximately 4,000 cfs from the dam in the months of July and August and has increased flows in June over prior operating rules (USBR, 2002).

- Water Quality – An interim TMDL has been identified for Flathead Lake and approved by the Flathead Basin Commission, EPA, and DEQ. The TMDL includes targets intended to curb large algal blooms in the lake based on lowering nutrient pollution from the upper Flathead basin to the 1976 level. As a part of the *Flathead Lake TMDL Implementation Plan*, the sources of pollution have been identified and the percentages of reduction for each pollution category have been determined. The Flathead Basin Commission is using a voluntary strategy to reduce these pollution sources.
- On-Reservation Reserved and Aboriginal Water Right Claims by the Confederate Salish and Kootenai Tribes - The Tribes are claiming all the water on and under the reservation as tribal water and that all the water on the reservation is to be administered and managed by the Tribes.
- Wild and Scenic River Designations - The North Fork, Middle Fork, and South Fork of the Flathead River are designated as "recreation" and "scenic" for those stretches outside of wilderness areas, and those within wilderness areas are designated as "wild." This federal designation precludes the development of water storage projects on these rivers and certain developments within the river corridor.
- Murphy Water Rights - The Flathead River and the three forks of the Flathead have instream flow water right claims for fish and wildlife. For example, DFWP has claimed instream flow rights ranging from 75 cfs to 2,325 cfs on the Middle Fork of the Flathead River depending on season and river stretch, 100 to 270 cfs on the South Fork and 2,100 to 5,000 cfs on the mainstem of the Flathead River into Flathead Lake.
- Glacier National Park Compact - A compact has been finalized with the National Park Service for Glacier National Park (GNP).[3] Key provisions of this compact include:
  - The United States has a priority date of May 11, 1910, for reserved water rights described in this compact.
  - A reserved water right for current and future consumptive use for the purposes of GNP.
  - Instream flow on various streams in the amount of the entire flow of the streams, less any United States' consumptive use rights described in this compact, and less state-recognized water rights appurtenant to non-federal land within the boundaries of GNP with a priority date before January 1, 1993. This reserved water right ends at the point the stream exits the reserved land of GNP.
  - The state retained the right to permit new consumptive uses up to specified amounts on the North and Middle forks of the Flathead River.
  - This compact treats surface and groundwater as a unitary resource.

Bitterroot River Basin

The constraints in the Bitterroot River sub-basin include:

- Basin Closure. (85-2-344 MCA.) The sub-basin is closed to all new water use permits except water from groundwater, appropriations for municipal water supply, and impoundments with a capacity of 50 acre-feet or larger. The closure will remain in effect until two years after an enforceable and administrable water rights degree is in place.

[3] See 85-2-702 MCA.

- Painted Rocks and Lake Como Water Contracts. Beginning in 1958, DFWP has purchased water from Painted Rocks to supplement flows in dewatered stretches of the Bitterroot River.[4] DFWP funded an increase in the height of the Como Lake Dam, and in return received annually 3,000 acre feet, i.e., 50 cfs for 30 days, of flow to benefit the fishery.
- Instream Flow Claim. DFWP has claimed instream flow water rights for the Bitterroot River from its mouth with the Clark Fork to the junction of the East and West forks of the Bitterroot River. The priority date is 1970 and the flows range from 350 cfs to 15,000 cfs. The recent Bean Lake Decision by the State Supreme Court may validate these water right claims.

Bibliography

For further information on the water management constraints discussed above see:

- Biological Opinion, Reinitiation of Consultation on Operation of the Federal Columbia River Power System, Including the Juvenile Fish Transportation Program, and 19 Bureau of Reclamation Projects in the Columbia Basin, National Marine Fisheries Service Northwestern Region, December 2000.
- Bull Trout Proposed Critical Habitat and Draft Recovery Plan, U.S. Fish and Wildlife Service, November 2002.
- Clark Fork River Operable Unit Record of Decision, EPA Region 8, 10 West 15th St., Suite 300, Helena, MT 59626, April 2004.
- Clark Fork River Voluntary Nutrient Reduction Program, Tri-State Water Quality Council, 307 North 2nd Ave., Suite 12, Sandpoint, Idaho, 83864, August 1998.
- Hell Gate Treaty of 1855, see http://www.lakecodirect.com/archives/hellgate_treaty.html.
- Milltown Reservoir Revised Proposed Plan, Milltown Reservoir Sediments Operable Unit, EPA Region 8, 10 West 15th St., Suite 300, Helena, MT 59626, May 2004.
- Nutrient Management Plan and Total Maximum Daily Load for Flathead Lake, Montana, Montana Department of Environmental Quality, December 2001.
- Pacific Northwest Coordination Agreement, Administered by the Northwest Power Pool, 26 SW Salmon Suite 400, Portland, Oregon 97204.

[4] The Montana Department of Fish, Wildlife and Parks holds two contracts for Painted Rocks water. The first was negotiated in 1958 and provides for 5,000 acre-feet of water annually for the useful life of the project. The second is a 10-year contract that expires on September 30, 2004, for an additional 10,000 acre-feet of water annually.